Filed 6/21/10 K.S. v. Super. Ct. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

K.S., Petitioner, v. THE SUPERIOR COURT OF SAN BERNARDINO COUNTY, Respondent; SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Real Party in Interest.	E050438 (Super.Ct.No. J229217) OPINION

ORIGINAL PROCEEDINGS; petition for extraordinary writ. Marsha Slough, Judge. Petition denied.

Monica Cazares for Petitioner.

No appearance for Respondent.

Ruth E. Stringer, County Counsel, and Jeffrey L. Bryson, Deputy County Counsel, for Real Party in Interest.

INTRODUCTION

Petitioner K.S. (mother) filed a petition for extraordinary writ pursuant to California Rules of Court, rule 8.452, challenging the juvenile court's order denying reunification services as to her child, I.R. (the child) and setting a Welfare and Institutions Code[1] section 366.26 hearing. Mother argues that the juvenile court erred in sustaining the section 300, subdivision (e), allegation (severe physical abuse), and denying her reunification services under section 361.5, subdivision (b)(5). She further contends that the San Bernardino County Children and Family Services (CFS) failed to provide predispositional services. We deny the writ petition.

FACTUAL AND PROCEDURAL BACKGROUND

On September 29, 2009, CFS filed a section 300 petition on behalf of the child, who was one month old at the time. The petition alleged that the child came within section 300, subdivisions (a) (serious physical harm), (b) (failure to protect) and (e) (severe physical abuse on a child under five years of age). The petition specifically alleged that while in the care and custody of mother and the child's father (father),[2] the child sustained nonaccidental physical injuries, including multiple rib fractures, a fracture of the left distal metaphyseal radius, a fracture of the left proximal metaphyseal tibia, and corner fractures of the distal left and right femur. The fractures were determined to be in various states of healing. The petition further alleged that mother knew or reasonably

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] Father is not a party in this petition.

should have known that the child was in critical condition, but she failed to recognize the signs and seek immediate medical attention. Moreover, mother knew or reasonably should have known that the child was exposed to father's substance abuse and history of aggression and anger management difficulties, and failed to adequately protect the child from him.

The detention report stated that on September 24, 2009, the child was taken to the San Bernardino Community Hospital by mother, who was 19 years old at the time, and father, who was 18 years old. The child had multiple fractures at different stages of healing. Both parents denied that the child had been dropped, maltreated, or abused by anyone. The social worker interviewed the parents separately. The parents reported they are separated, and that mother lives in a rented room with the child in Fontana, while father lives with a friend in Ontario. Mother said she was the child's sole caregiver. Father reported that he would pick up the child for visits, and then he would return the child to mother's care. Father reported that he and the child had spent the previous weekend at his mother's home, and that his mother slept in a bed with the child. Father opined that his mother possibly rolled over onto the child in her sleep, causing the fractures. However, the emergency room doctor told the social worker this explanation was inconsistent with the child's injuries. Father also reported that during the stay with his mother, he took the child to visit a friend and his friend's 16-year-old girlfriend. He said he allowed the girlfriend to hold the child for about 20 minutes while he went outside to smoke a cigarette. When he returned, the girlfriend handed him the child, who was crying hysterically. Father opined that the girlfriend probably dropped the child.

The child was transferred to Loma Linda University Medical Center for further evaluation. The child was examined by Mark Massi, M.D., who reported that the child had four fractured ribs, a fracture of the left forearm, a fracture of the left lower leg, and corner fractures in both thighs. Dr. Massi opined that the child had multiple fractures with no history of trauma, so the injuries were likely due to physical abuse and neglect due to delay in seeking medical care.

On September 28, 2009, the parents walked into the social worker's office stating they wanted to tell the truth about how the child possibly suffered fractures to her legs. Father began by stating that he had previously lied and was actually living with mother and the child. He reported that on September 22, 2009, he dropped the child while bathing her, and his first reaction was to grab her by the legs to prevent her from plunging into the bathtub. When he did so, he heard a snap, and the child began crying loudly. Thereafter, the child would cry when her legs were moved to change her diapers. Father said he was afraid and did not tell mother of the incident. The social worker noted that the parents were still unable to explain how the child suffered the other fractures on her ribs, left forearm, and left lower leg. The police took the child into protective custody and, upon discharge, the child was placed with the maternal grandparents.

The detention hearing was held on September 30, 2009, and the court detained the child. Mother's counsel requested an immediate referral for mother to a licensed therapist. The court agreed, stating that "it would probably be in everybody's best interest [to] have a licensed therapist."

Jurisdiction/disposition

The social worker filed a jurisdiction/disposition report on October 19, 2009, recommending that the court find the allegations in the petition true and that neither parent receive reunification services. The social worker noted that the parents received referrals for therapy, an anger management program, and parenting classes on September 30, 2009. The parents stated that they had enrolled in parenting classes, and that the anger management program was scheduled to begin soon. However, even with the provision of those services, it was not possible to maintain the child in their home, since there was no way to ensure the child's safety, short of removal. The social worker opined that the prognosis for reunification appeared to be poor. Both parents stated that they were the only caretakers for the child. However, they had no reasonable explanations for the multiple serious injuries the child sustained while in their care and custody. The social worker concluded that the extent of injuries, in various stages of healing and without any traumatic event causing them, placed the child at serious risk of harm if reunited with the parents.

A contested jurisdictional hearing was held on December 22, 2009. Dr. Massi testified at the hearing that he examined the child. She had a fracture of one of the bones in her forearm; both of her thigh bones (femurs) were completely broken; and her left shin bone (tibia) was broken. The X-rays revealed that both thigh bones and the shin bone showed signs of new bone formation, which indicated that those injuries were sustained at least seven to 10 days prior to the X-ray being taken on or around September 24, 2009. However, the X-ray of the forearm did not reveal any new bone formation,

which indicated that that fracture occurred any time between zero and seven to 10 days prior to the X-ray being taken. Thus, Dr. Massi opined that the injuries to the thigh bones and shin bone occurred prior to the wrist fracture. In addition, the child had sustained nine rib fractures. Dr. Massi dated the rib fractures as being less than seven to 10 days old. He opined that the child's injuries were the result of physical abuse and neglect. This opinion was based on the fact that the child was an infant who was nonmobile, there was no history of any trauma, and there were at least two instances of injury to the child. He further testified that the injuries were inconsistent with a child sleeping in a bed with an adult and being rolled on. He also noted that, although the injuries to the child's thighs could have been caused by someone holding the child by the legs, the bathtub incident described by father occurred on September 22, 2009, which was only two days before the X-rays were taken. Since the X-rays revealed that the fractures had signs of healing and were therefore seven to 10 days old, the time frame of the injuries was inconsistent with father's explanation.

With regard to pain, Dr. Massi testified that an infant with broken femurs and a broken tibia would have been in a lot of pain that was "fairly constant." Rib fractures would also cause a lot of pain to an infant, especially when being picked up.

Mother also testified at the hearing. She said she was not currently living with father. However, she and father and the child were living together from the time the child was born until the time she was removed from them. During that time, neither mother nor father worked and, thus, they were the sole caregivers to the child. Mother testified that the first time she noticed anything wrong with the child was two or three days before

she took the child to the hospital. She noticed the child would cry a lot when mother moved the child's legs and changed her diaper. Even after hearing Dr. Massi's testimony, mother maintained that she had no idea the child had been physically abused or had sustained all those fractures. She said that when she picked up the child, she did not notice any fussiness or crying in the two to three days before she took the child to the doctor. Mother testified that she and father were no longer together as a couple, but she lived with him up until five days before the hearing. She said she did not believe that father had physically abused the child, yet she had no explanation for all of the child's fractures.

The court made minor amendments to the allegations under section 300, subdivisions (a) and (e), and found them true. The court found all the other allegations true as written. Thus, the court found that the child came within section 300, subdivisions (a), (b), and (e).

A contested dispositional hearing was held on March 4, 2010. The social worker assigned to mother's case testified that mother received referrals for services prior to the detention hearing. The first social worker gave mother the referrals, and the current social worker discussed them with her.

Heidi Knipe-Laird, Ph.D., a licensed psychologist who conducted an evaluation on mother, also testified at the hearing. Dr. Knipe-Laird was asked whether she had considered CFS's recommendation to deny mother reunification services during her evaluation of mother. Dr. Knipe-Laird responded that the focus of her evaluation was on the wisdom of mother's decision to let the child remain with her mother (the maternal

grandmother), and that in order for mother to have a role in the child's care in the future, she would have to "get a solid footing as a young adult, self-supporting, and with more mature judgment." Dr. Knipe-Laird was also asked if she had an opinion as to whether or not mother would be able to benefit from services. She responded that if CFS were to offer the services, "it would be an important component in [mother]'s work that she needs to do to become an effective parent." Dr. Knipe-Laird was then asked if she believed mother's participation in reunification services would likely prevent reabuse or continued neglect of the child. She responded that she believed the services "would prevent reoccurrence of the situation that [mother] finds herself in." Dr. Knipe-Laird clarified that she was referring to the fact that mother would tolerate a situation where she was with an abusive boyfriend and where "her baby would come to be harmed." Dr. Knipe-Laird recommended that mother receive structured cognitive therapy to address various issues; however, her recommendation was based on the assumption that mother was not the actual perpetrator of the abuse. Dr. Knipe-Laird was later asked how long it would take, in the recommended therapy, to make somebody a protective mother. She responded that the rate of progress could be assessed after six months of therapy, since, by then, a "measureable result" could be provided. However, she cautioned that "nothing is fixed in six months."

Mother also testified at the hearing. Mother said that when the child was initially removed, the first social worker gave her a "packet of classes" and told her she needed to participate in the parenting classes and counseling. Mother enrolled in a parenting class, but only attended six out of 10 classes. She testified that she had missed four classes

because she did not have reliable transportation. Mother stated that she did not know CFS would help her obtain transportation. She also testified that she tried signing up for counseling at Bilingual Family Services, but that she was advised she needed a referral. She asked the current social worker for a referral, but he said he could not give her one since this was a "no FR [family reunification] case." Mother further testified that she tried enrolling at Catholic Charities and actually had an upcoming appointment with the agency. She confirmed that after the child was removed from her care, she continued to live with father for three more months.

After reading all the reports and hearing all the testimony, the court stated that it appeared that the social worker decided that this was a no FR case and, thus, limited effort was required on his part. The court was very disappointed in the social worker's "lack of effort." The court stated that it did not know who caused the child's injuries, but it was not willing to assume it was father. The court was concerned about mother, based on her "demeanor in court," her "testimony," and the "information received" about the case. The court then denied mother reunification services under section 361.5, subdivision (b)(5), and scheduled a section 366.26 hearing.

ANALYSIS

I. There Was Sufficient Evidence to Sustain the Allegation Under Section 300, Subdivision (e)

Mother first contends that her conduct did not provide a basis for jurisdiction under section 300, subdivision (e). Section 300, subdivision (e), provides that the court has jurisdiction where "[t]he child is under the age of five years and has suffered severe

physical abuse by a parent, or by any person known by the parent, if the parent knew or reasonably should have known that the person was physically abusing the child." The specific allegation mother disputes stated that on September 24, 2009, and on prior occasions, while in her care and custody, the child "sustained non-accidental physical injuries" consisting of numerous fractures, which were determined to be in various stages of healing, and that mother knew or reasonably should have known that the child was being physically abused. We conclude there was sufficient evidence to support the court's true finding.

A. *Standard of Review*

In evaluating whether the child came under section 300, subdivision (e), we use the substantial evidence standard of review, under which "we determine whether evidence that is of reasonable, credible and solid value supports the dependency court's findings. We do not reweigh the evidence, nor do we consider matters of credibility." (*In re E.H.* (2003) 108 Cal.App.4th 659, 669 (*E.H.*).)

B. *There Was Sufficient Evidence*

Mother specifically argues there was no indication that she was aware of the bathtub incident or any other incident of abuse by father, that there was no evidence she reasonably should have known about the physical abuse of the child, and there was no evidence that she herself caused the injuries to the child. While we agree there was no direct evidence that mother or father abused the child, there was overwhelming circumstantial evidence to support the section 300, subdivision (e), allegation. Essentially, CFS employed a "'res ipsa loquitur'" type of argument to support a

jurisdictional finding under subdivision (e). (See *E.H.*, *supra*, 108 Cal.App.4th at pp. 669-670.)

There was severe physical abuse, as evidenced by the child's multiple fractures. Dr. Massi opined that the child's injuries were the result of physical abuse, based on the fact that the child was an infant who was nonmobile, there was no history of any trauma, and there were at least two instances of injury to the child, as indicated by the new bone formation on the thigh bone and shin bone. The new bone formation indicated that those injuries were sustained at least seven to 10 days prior to the X-ray being taken on or about September 24, 2009. Furthermore, Dr. Massi testified that an infant with broken femurs and a broken tibia would have been in "a lot of pain" that was "fairly constant." In addition, the child had nine rib fractures, which would also cause a lot of pain to an infant, especially when being picked up.

Given the extensive nature of the child's injuries, it is simply inconceivable that mother did not notice anything wrong with the child until two or three days before she took the child to the hospital. To make matters worse, mother had no explanation for all of the child's fractures. The only reasonable conclusion that may be drawn from the evidence is that mother either abused the child or *reasonably* should have known the child was being physically harmed. Furthermore, there was substantial evidence from which the court could conclude that mother let the child suffer in serious pain for approximately seven to 10 days.

We conclude that the court properly sustained the allegation under section 300, subdivision (e).

II. The Court Properly Denied Mother Reunification Services

Mother argues that the court erred in denying reunification services under section 361.5, subdivision (b)(5). She contends that the social worker failed to investigate the circumstances leading to the child's removal and advise the court whether reunification was likely to be successful or unsuccessful. Thus, she claims there was insufficient evidence to support an order denying services. We disagree.

A. *Standard of Review*

"We affirm an order denying reunification services if the order is supported by substantial evidence." (*In re Harmony B.* (2005) 125 Cal.App.4th 831, 839 [Fourth Dist., Div. Two].) "'In juvenile cases, as in other areas of the law, the power of an appellate court asked to assess the sufficiency of the evidence begins and ends with a determination as to whether or not there is any substantial evidence, whether or not contradicted, which will support the conclusion of the trier of fact. All conflicts must be resolved in favor of the respondent and all legitimate inferences indulged in to uphold the verdict, if possible.'" (*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 600 (*Francisco G.*).)

B. *The Court Properly Denied Services Under Section 361.5, Subdivision (b)(5)*

Section 361.5, subdivision (b), "sets forth a number of circumstances in which reunification services may be bypassed altogether. These bypass provisions represent the Legislature's recognition that it may be fruitless to provide reunification services under certain circumstances." (*Francisco G., supra*, 91 Cal.App.4th at p. 597.) Specifically, "[r]eunification services need not be provided to a parent or guardian . . . when the court

finds, by clear and convincing evidence, any of the following: [¶] . . . [¶] (5) That the child was brought within the jurisdiction of the court under subdivision (e) of Section 300 because of the conduct of that parent or guardian. [¶] . . . [¶ or] (7) [t]hat the parent is not receiving reunification services for a sibling or a half sibling of the child pursuant to paragraph (3), (5), or (6)." (§ 361.5, subd. (b)(5), (b)(7).)

Mother argues that the court erred in denying her services under section 361.5, subdivision (c), which provides that "the court shall not order reunification in any situation described in paragraph (5) of subdivision (b) unless it finds that, based on competent testimony, those services are likely to prevent reabuse or continued neglect of the child or that failure to try reunification will be detrimental to the child because the child is closely and positively attached to that parent." In support of her claim, mother contends the social worker did not satisfy its investigatory duty under section 361.5, subdivision (c), to investigate the circumstances leading to the child's removal. She further claims that the factors listed in section 361.5, subdivision (c), were in her favor, and that Dr. Knipe-Laird's testimony indicated that the "services were likely to prevent reabuse."

The social worker's jurisdiction/disposition report filed October 19, 2009, reflected an exhaustive investigation of the circumstances leading to the child's removal. Furthermore, as reflected in the report, not all of the factors listed in section 361.5, subdivision (c), were applicable here. That subdivision lists factors that could indicate reunification services are likely to be unsuccessful, including the failure of the parent to respond to previous services, the fact that the child was abused while the parent was

under the influence of drugs or alcohol, a past history of violent behavior, and testimony by a competent professional that the parent's behavior is unlikely to be changed by services. The report stated that mother had no prior child welfare history, and there was no evidence that the child was abused while a parent was under the influence. The report also stated that father admitted he had a problem with aggression and controlling his anger when he drank alcohol, but he denied he was aggressive with the child.

As far as evidence from a competent professional as to whether reunification services were likely to be successful, there was no evidence affirmatively showing that services would likely prevent reabuse, contrary to mother's claim. After interviewing mother, Dr. Knipe-Laird noted mother's immaturity and recommended individual therapy. She also recommended that the child remain in the maternal grandmother's care until mother was "able to take the role of an effective, nurturing, and fully protective parent." At the hearing, Dr. Knipe-Laird admitted, "the question whether [mother] is able to benefit from services was not primary in my thinking because [mother] had indicated that she was quite comfortable having her mother remain the primary caregiver for the child." Thus, in evaluating mother, Dr. Knipe-Laird's focus was "more on reinforcing that plan that [mother] had formed for herself, that the [maternal grandmother] would remain as the primary caregiver for the child while [mother] herself returned to school and became an independently functioning young adult." When asked directly whether she had an opinion as to whether or not mother would be able to benefit from services, Dr. Knipe-Laird simply stated that she believed services "would be an important component in [mother]'s work that she need[ed] to do to become an effective

parent." When asked directly whether she believed reunification services would likely prevent reabuse or continued neglect of the child, Dr. Knipe-Laird again avoided giving a "yes" or "no" answer. Instead, she only responded that she believed the "services would prevent reoccurrence" of the situation mother was in—that of being with an abusive boyfriend and exposing the child to harm.

Dr. Knipe-Laird recommended that mother receive structured cognitive therapy; however, her recommendation was based on the assumption that mother was not the actual perpetrator of the abuse. Dr. Knipe-Laird was later asked how long the recommended therapy would take in order to help somebody become a protective mother. She responded the progress could be assessed after six months, but warned that "nothing is *fixed* in six months." (Italics added.) However, since the child was only one month old when she was removed from mother's custody, mother would have only been provided with services for six months. (§ 361.5, subd. (a)(1)(B).) Thus, pursuant to Dr. Knipe-Laird's opinion, such services would not have been enough to prevent reabuse or continued neglect.

Ultimately, the court was required not to order reunification services for the parents unless it found, by clear and convincing evidence, that reunification was in the best interest of the child. (§ 361.5, subd. (c).) Clearly, it was not in the child's best interest to reunify with mother. Mother was the primary caregiver of the child, yet failed to notice anything unusual about her until two or three days before the child was found to have serious injuries. Moreover, mother had no idea how the child sustained all those injuries. Despite hearing Dr. Massi's testimony that the child's injuries were sustained

up to seven to 10 days before the child was taken to the hospital for X-rays, mother maintained that she had no idea what or who caused the child's injuries. Considering the extent of the child's injuries, mother's complete lack of awareness (or alleged unawareness) regarding the child's condition is simply inconceivable. The court's decision to deny services to mother, who was in complete denial and took no responsibility for the child's injuries and/or her failure to protect the child, was absolutely correct.

III. Deficiencies in CFS's Predispositional Services Did Not Render the Court's Determinations Reversible

Finally, mother argues that CFS had a duty to provide predispositional services for the purpose of facilitating reunification and, because CFS failed to provide such services, the order denying reunification services should now be reversed. We disagree.

Mother asserts that the predispositional services provided to her "were non-existent and deficient and unreasonable." Mother claims CFS failed to offer or help her obtain any services. The record belies this claim. The record shows mother received referrals for therapy, an anger management program, and parenting classes on September 30, 2009. In fact, mother stated that she had enrolled in parenting classes and that the anger management program was scheduled to begin soon. At the dispositional hearing, mother further testified that when the child was initially removed, the first social worker gave her a packet of referrals and told her to participate in parenting classes and counseling. Mother testified that she enrolled in a parenting class, but only attended six out of 10 classes.

We acknowledge that CFS could have done more to assist mother in obtaining predispositional services. As noted by the court, the social worker's efforts to provide further services were limited and deficient. Nonetheless, mother has failed to provide any authority for her claim that a deficiency in predispositional services mandates a reversal of the court's decision to deny reunification services. Moreover, in light of the evidence in this case, and the court's proper findings and determinations (see *ante*, §§ I. & II.), we conclude that there is no basis upon which to reverse the court's order denying reunification services.

DISPOSITION

The petition is denied.

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HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.